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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1119

CERTIFIED OIL COMPANY INC., Bankrupt,
and HAROLD F. FISHBECK,

Petitioners,

—against—

GEORGE J. RUDNICK and HARRY RICE,

Respondents.

PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and The Associate Justices of the Supreme Court of the United States:

The petitioners, CERTIFIED OIL COMPANY INC. and HAROLD F. FISHBECK, respectfully show to this Court:

Statement of the Matter Involved

An involuntary petition in bankruptcy was filed against Certified Oil Company, Inc. in the United States District Court, Eastern District of New York.

The Respondents filed a proof of claim against the bankrupt for $21,000.00, which amended their original claim for $2,000.00 (R. 9). Said claim was based upon an as-

signment allegedly made by a New York Corporation, Natural Petroleum Corporation to the Respondents and one, Robert Rodman.

Harold F. Fishbeck, a creditor of the bankrupt and the bankrupt moved to disallow and expunge said claim, setting forth thirteen objections thereto (R. 18, *et seq.*).

Bankruptcy General Order 21 provides that where a claim has been assigned after the commencement of the bankruptcy proceedings, but before the proof of claim has been filed, the proof of claim must be supported by an affidavit of the owner of the claim at the time of the commencement of proceedings, setting forth the true consideration for the debt, what payments have been made thereon, that is entirely unsecured, or if secured, what the security is.

The involuntary petition in bankruptcy was dated October 26, 1942, and filed shortly thereafter. The assignment was dated and executed on July 28th, 1943. Hence, the provisions of General Order 21 aforesaid, were applicable to the proof of claim which was required to be supported by the affidavit of the owner at the time of the commencement of the proceedings setting forth the prescribed information.

No supporting affidavit by the original owner of the claim, Natural Petroleum Corporation, was submitted or filed at any time.

Numerous hearings were held over a long period of time, countless witnesses were called, and voluminous testimony was taken by the Referee in Bankruptcy who found that the claim may not be allowed because there never was any obligation to support it, nor did any consideration pass when it was assigned to the petitioning claimants by one, Rodman (President of claimant's assignor) (fol. 186).

Rodman, in addition to being the President of the claimants' assignor, was one of the assignees himself.

Upon a review of the first order of the Referee, the matter was remanded by the District Judge for rehearing (R. 62, *et seq.*).

Upon rehearing, the Referee again expunged and disallowed the claim (R. 140, *et seq.*). Upon review, said order was affirmed by the District Court (R. 186).

An appeal was thereafter taken to the Circuit Court of Appeals for the Second Circuit, which reversed the order of the District Court and remanded the proceedings. The majority opinion was written by Circuit Judge Frank. The dissenting opinion was written by Circuit Judge Swan.

Jurisdictional Statement

The basis upon which it is contended that this Court has the jurisdiction to review the order of reversal are the provisions of Section 47 of the Bankruptcy Act (11 U. S. C., Section 47); the provisions of Section 240(a) of the Judicial Code (28 U. S. C., Section 347) and Bankruptcy General Order No. 36.

The Questions Presented

1. *Is the requirement of General Order 21, Subdivision 3, that the proof of claim is to be supported by the affidavit of the owner at the time of the commencement of proceedings, mandatory or permissive?*

Judge Kennedy in his opinion on the review from the first order of the Referee, said:

> "Until now, I have made no mention of the fact that possibly General Order 21 (3) may have a bearing here. It provides in part that where a claim has been assigned after the commencement of the proceedings,

but before proof of claim has been filed, the proof of claim must be supported by the affidavit of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt, what payments have been made thereon, and whether it is secured or unsecured. The implication is that unless such proof be filed, the assigned claim is not within the terms of the General Order and may be stricken" (R. 65).

In *Collier on Bankruptcy*, 14th Edition, Volume 3, at page 142, in discussing the requirements for a claim assigned after filing of the petition, but prior to proof of claim, as in the instant proceeding, it is stated:

"The assignor's supporting affidavit with which the law dispenses in cases of pre-bankruptcy assignments is made mandatory where a claim has been assigned in the interval between institution of bankruptcy proceedings and the filing of proof of claim * * * The assignee as the owner at the date of making proof must prove his claim, but his affidavit must be supplemented by that of the better informed assignor. A refusal on the part of the assignor to make the required affidavit normally results in disallowance * * * the Court may not dispense with the original creditor's statement, which is a safeguard required in the interest of the other creditor and the bankrupt."

And at page 120 thereof, it is stated:

"Yet notwithstanding a certain degree of leniency by the Courts in dealing with proofs of claim, the principle undoubtedly is that proofs should meet the re-

quirements of the Act, the General Orders and the Official Forms. The object to be borne in mind is to establish a clear prima facie case * * * it must be detailed and substantial enough to allow the Court to accept it as a prima facie case * * * 'A proof of claim consists of a verified writing setting forth the claim with other particulars' (citing *Matter of Petrich*, 43 Fed. (2nd) 435). The particulars are an integral part of the proof. Unless they are submitted in due form * * * the proof is not complete and the claim may be disallowed."

Circuit Judge Frank in the majority opinion of the Court said:

> "Aware that, literally, the language of the Order is mandatory, we are not prepared to say what our decision would be if the claimants had been unable to obtain any affidavit whatever from the assignor. For here they did obtain one, and it contains the most important element, i.e., the necessary information about the consideration. In the circumstances, on familiar equitable grounds, full literal compliance with the General Order must be excused."

The affidavit to which Judge Frank referred was that of Robert Rodman, one of the assignees of Natural Petroleum Corporation, who was also the President of the assignor corporation. In that affidavit, Rodman sets forth the reasons for his refusal to furnish in behalf of the assignor an affidavit under General Order 21(3), and states that there was no consideration for the assignment, avers that the only reason he executed the assignment in behalf of the assignor corporation was because of threats made and

duress employed and concludes that the assignment was void from its inception (R. 138).

2. *Did the affidavit of Robert Rodman comply with the requirements of General Order 21, Subdivision 3?*

General Order 21, Subdivision 3 provides that the proof of claim must be supported by an affidavit of the original owner thereof, setting forth the true consideration for the debt, what payments have been made thereon, whether or not it is secured or unsecured, and if secured, what such security is.

Although their proof of claim was dated November 10th, 1943, and the last hearing before the Referee in Bankruptcy was held on September 5th, 1945, the Respondents failed to submit the affidavit of their assignor, Natural Petroleum Corporation, the original owner.

Mr. Rodman's affidavit was submitted in opposition to the claim. He sets forth therein his reasons for refusing, as an officer of the assignor corporation, to make an affidavit in compliance with the General Order aforesaid. He insisted therein that there was no consideration for such assignment, and that the assignment was void from its very inception. He makes no mention therein of payments made on account of the claim, or concerning security (R. 138).

Circuit Judge Frank said:

> "Rodman's affidavit fulfills the requirements of the Order insofar as they relate to consideration; for, where an assignment requires no consideration, a statement that none existed is enough. Rodman's affidavit does not detail the amount of the claims, whether or not they are secured, and whether or not any payments have been made."

3. *Was the assignment signed by the assignor?*

The assignment is presumably that of Natural Petroleum Corporation, a New York corporation. It was allegedly executed in behalf of the corporation by Robert Rodman, its President. It will be recalled that Mr. Rodman is also one of the assignees. The acknowledgment recites that the assignment was executed by Mr. Rodman and the corporate seal affixed thereto by order of the Board of Directors of the Corporation.

The proof was that the assignment was not made by, for or in behalf of the assignor corporation. Actually only Robert Rodman, its President, received a personal benefit thereby (fols. 458, 498). The Board of Directors had never met and had never authorized the making of the assignment (fol. 515).

The applicable law is summarized in *14-A C. J. 111* at Section 1878 as follows:

> "The Directors or contracting officers of a Corporation are without authority to divest its property or pledge its credit to the payment or securing of their individual debts; and where they do so, they are liable and accountable therefor to the Corporation and the stockholders. * * * Such transactions will be annulled in any appropriate proceeding without regard to the form which they may have taken, saving, of course, the rights of innocent third persons."

Mr. Rodman in his affidavit in opposition to the claim said:

> "the only reason I executed the assignment in behalf of Natural Petroleum Corporation was because of the threats made and because of the duress employed by Rudnick" (R. 139).

Section 33, Subdivision 4, Personal Property Law of the State of New York provides:

> "An assignment hereafter made shall not be denied the effect of irrevocably transferring the assignor's rights because of the absence of consideration, if such assignment is in writing and signed by the assignor, or his agent."

Circuit Judge Frank said:

> "As there was an absence of corporate action by NATURAL authorizing the assignment, appellee asserts that it was invalid. Rodman, however, testified before the Judge that, when he executed it, he was NATURAL'S sole stockholder. He had previously testified before the Referee that there had been another stockholder. The judge made no finding on that issue of fact. It is suggested that, even if he had found it in favor of appellants, they could not win because (1) their pleadings were not based on a disregard of the corporate fiction, and (2) in any event, they had the burden of proof. But a proof of claim is hardly a pleading, and in any event the formal proof of claim seems adequate as a statement of ultimate facts. And the testimony as to Rodman's sole ownership of all the stock when the assignment was made might well have justified a conclusion in favor of its validity."

4. *In the absence of consideration, was the assignment valid?*

The proof was that there had been an absence of corporate action by Natural Petroleum Corporation, the assignor, authorizing the assignment. Robert Rodman, the

President of the assignor corporation, who executed the assignment and who was one of the assignees himself, testified that there had been no consideration for the assignment. In fact at the hearing before District Judge Kennedy, on the review from the order of the Referee in Bankruptcy which expunged and disallowed the claim, the Court asked Rodman:

> "So, that if you were to swear that NATURAL got anything in return for the assignment, you would be committing perjury?
>
> The Witness: Oh, yes—definitely" (fol. 498).

It had been conclusively proved that since the assignment was not authorized by any corporate action, it was not signed by the assignor and that there had been no consideration therefor.

Circuit Judge Frank said:

> "The assignment needed no consideration; See New York Personal Property Law, Section 33, Subdivision 4."

5. *Is New York Penal Law, Section 274 applicable to the assignment?*

George J. Rudnick, one of the respondents and one of the assignees who filed the proof of claim aforesaid, is an attorney at law admitted to practice his profession in the State of New York.

It was conclusively proved that Rudnick had never rendered any services for Natural Petroleum Corporation, his assignor, and that he had not parted with anything of value which could be considered consideration for the assignment (fol. 414).

New York Penal Law, Section 274 provides:

> "An attorney or counsellor shall not:
>
> (1) Directly or indirectly, buy, take an assignment of or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.
>
> (2) By himself or by or in the name of another person, either before or after action brought, promise or give, or procure by promise or give a valuable consideration to any person as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a payment of any kind, for the purpose of bringing action thereon, or of representing the claimants in pursuit of any civil remedy for the recovery thereof. • • •
>
> (3) An attorney or counsellor who violates the provision of this Section is guilty of a misdemeanor."

It was urged that the assignment was, by reason of the foregoing, invalid.

Circuit Judge Frank said:

> "Appellee asserts that the assignment was invalid under New York Penal Law, Section 274, because one of the assignees was a lawyer. • • • We incline to believe that, on the facts now before us, this Statute is here inapplicable. • • • "

Reasons for the Allowance of the Writ

1. The Court below has decided several important questions of Federal Law which have not been, but should be, settled by this Court.

2. Innumerable proofs of claim requiring compliance with General Order 21, Subdivision 3, are filed daily in bankruptcy proceedings involving tremendous sums of money. Although said General Order is mandatory, the Circuit Court of Appeals indicated that on equitable grounds full compliance with the General Order would be excused. Such question has not been, but should be, settled by this Court.

These reasons are discussed in petitioner's brief (pp. 13 to 24, *infra*).

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled in its Docket #20343 (No. 75—October Term, 1946), George J. Rudnick and Harry Rice, Claimants-Appellants, against Harold F. Fishbeck, Objectant-Creditor-Appellee (In the Matter of Certified Oil Company Inc., Bankrupt-Appellee) to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the order herein of the said Circuit Court of Appeals be reversed by this Court, and for such further or different relief as to this Court may seem proper.

Dated New York, March 7, 1947.

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DAVID SKLAIRE,
Counsel for
Harold F. Fishbeck, Objectant-Creditor.

DAVID SKLAIRE,
Of Counsel.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Second Circuit has not yet been reported, but appears in the certified copy of the transcript of record (R. 193). There was no opinion by the District Court, although findings were made by the District Court during the course of the hearing before it on the review from the order of the Referee in Bankruptcy which expunged and disallowed the claim. (Such transcript of the hearings also appears in the transcript [R. 163, *et seq.*].) The order of the District Court appears in the transcript (R. 186, *et seq.*).

Jurisdiction

Reference is made to the jurisdictional statement in the petition (p. 3).

Statement of the Case

Reference is made to the "statement of the matter involved" in the petition (pp. 1 to 3).

Specification of Errors

1. The Circuit Court erred in failing to hold that the requirements of General Order 21, Subdivision 3, regarding the supporting affidavit of the original owner concerning the true consideration for the debt, what payments were made thereon, whether or not it was secured or unsecured, or if secured, what the security was, were mandatory.

2. The Circuit Court erred in holding that on equitable grounds full compliance with the General Order will be excused.

3. The Circuit Court erred in holding that the affidavit of Robert Rodman submitted in opposition to the proof of claim fulfills the requirements of the General Order.

4. The Circuit Court erred in failing to hold that the assignment was not signed by the assignor.

5. The Circuit Court erred in holding that where no corporate action was taken on an assignment of a claim owned by a corporation and the assignment was not author-

ized by the corporation, that consideration need not be shown.

6. The Circuit Court erred in holding that an assignment executed by a stockholder of a corporation, which is not authorized by its board of directors, will, nevertheless, bind the corporation.

7. The Circuit Court erred in failing to hold that the assignment was invalid under New York Penal Law, Section 274.

8. The Circuit Court erred in reversing the order of the District Court and in remanding the cause.

Summary of Argument

1. The effect of the decision of the Circuit Court is to disregard the requirements of General Order 21, Subdivision 3.

2. The effect of the decision of the Circuit Court is to disregard well established principles of corporate law.

3. The effect of the decision of the Circuit Court is to disregard the provisions of New York Statutes.

POINT I

The effect of the decision of the Circuit Court is to disregard the requirements of General Order 21, Subdivision 3.

General Order 21, Subdivision 3 was enacted as a safeguard in the interests of creditors and the bankrupt. Said General Order prescribes certain requirements concerning the supporting affidavit of the original owner of a claim against a bankrupt. Such affidavit is an integral part of the proof. The proof is not complete without such affidavit and the Court may not dispense with the original creditor's statement.

It was conceded that since the claim had been assigned after the commencement of the bankruptcy proceedings, but before the proof of claim had been filed that General Order 21, Subdivision 3 was applicable to such proof of claim.

The General Order aforesaid provides that:

> "If a claim has been assigned after the commencement of the proceedings, but before proof of claim has been filed, the proof of claim therefore shall be supported by an affidavit of the owner at the time of the commencement of proceedings, setting forth the true consideration for the debt, what payments have been made thereon, and that it is entirely unsecured, or if secured, the security as is required in proving secured claims. * * *"

In *Collier on Bankruptcy,* 14th Edition, Volume 3, paragraph 57.03, page 120, it is stated:

> "Yet notwithstanding a certain degree of leniency by the Courts in dealing with proofs of claim, the

principle undoubtedly is that proofs should meet the requirements of the Act, the General Orders, and the Official Forms. The object to be borne in mind is to establish a clear prima facie case. * * * The particulars are an integral part of the proof. Unless they are submitted in due form * * * the proof is not complete and the claim may be disallowed."

The requirements for a proof of debt are discussed in Volume 1, *Bankruptcy Service,* issued by Prentice Hall at page 4031, as follows:

> "1. Section 57-a of the Bankruptcy Act prescribes certain formalities for the proof of claim; Section 57-b others. General Order XXI prescribes still more; the forms are in addition."

The Circuit Court of Appeals for the Second Circuit, in *In re Branner,* 9 Fed. (2nd) 883, 886, said:

> "Section 57-a (Comp. St. Section 9641) prescribes certain formalities for the proof of claim; Section 57-b, others. General Order XXI prescribes still more; the forms are in addition. Only when the proof of claim conforms with these provisions is it 'duly proved' under Section 57-b and entitled to allowance."

Hence, all of the formalities and requirements aforesaid had to be complied with before the Court could accept the proof of claim. The Respondents could never "duly prove" their claim without the required supporting affidavit of their assignor, the original creditor. Even if the original creditor refused to furnish such supporting affidavit the claim would normally be disallowed.

Thus, in *Collier on Bankruptcy, supra,* at page 142, it is stated:

> "The assignor's supporting affidavit with which the law dispenses in case of pre-bankruptcy assignments is made mandatory where a claim has been assigned in the interval between institution of bankruptcy proceedings and the filing of proof of claim. * * * The assignee as the owner at the date of making proof must prove the claim, but his affidavit must be supplemented by that of the better informed assignor. A refusal on the part of the assignor to make the required affidavit normally results in disallowance. * * * The Court may not dispense with the original creditor's statement, which is a safeguard required in the interest of the other creditor and the bankrupt."

It is respectfully submitted that the effect of the Circuit Court decision is to disregard the requirements of General Order 21(3), as a result of which a condition of chaos has been produced. The intent to safeguard the interests of the bankrupt has as a result thereof been disregarded and merely upon the plea of one asserting a claim against a bankrupt that he is unable to obtain a supporting affidavit from his assignor, the original creditor, compliance with General Order 21(3) will be excused.

Without such supporting affidavit, the Respondents have been unable to prove a prima facie case and they will never be able to "duly prove" their claim.

The meaning of General Order 21(3) has therefore been subjected to serious doubt and the provisions thereof which have heretofore protected the rights of bankrupts and other creditors have by the decision of the Circuit Court of Appeals been made inapplicable.

A decision by this Court is therefore necessary to settle the law.

It is conceded that in the more than two years which elapsed between the filing of the proof of claim and the last hearing before the Referee in Bankruptcy, the Respondents had not submitted or filed a supporting affidavit of their assignor, the original owner of the alleged claim. The President of the assignor, who had executed the assignment although never authorized to do so by any corporate action, who was one of the assignees himself, testified at the hearings and submitted an affidavit in opposition to the proof of claim in which he set forth his reasons for refusing to make the supporting affidavit. In that affidavit, among other things, Rodman insisted that there had been no consideration for the assignment.

Even though it has been held as aforesaid that such supporting affidavit is mandatory and that the Court may not dispense therewith since such affidavit is a safeguard required in the interests of other creditors and the bankrupt, and even though Circuit Judge Frank in the majority opinion recognized that the affidavit of Rodman which was submitted in opposition to the proof of claim failed to set forth the statements required by General Order 21(3) (although he indicated that Rodman's statement in such opposing affidavit that there was no consideration for the assignment fulfilled the requirements of the order insofar as they relate to consideration), the Circuit Court of Appeals held:

> "In the circumstances, on familiar equitable grounds, full literal compliance with the General Order must be excused."

POINT II

The effect of the decision of the Circuit Court is to disregard well established principles of corporate law.

Circuit Judge Frank in the majority opinion recognized that there was an absence of corporate action by Natural Petroleum Corporation, authorizing the assignment. It was conclusively proved that the Board of Directors of Natural Petroleum Corporation had never met and had never authorized the making of the assignment. The Circuit Court of Appeals disregarded well established principles of corporate law in granting validity to the assignment.

Such principles are summarized in *14-a C. J. 111* at Section 1878, as follows:

> "The Directors or contracting officers of a Corporation are without authority to divest its property or pledge its credit to the payment or securing of their individual debts; and where they do so they are liable and accountable therefor to the Corporation and the stockholders (Close v. Patter, 25 N. Y. Supp. 872; 5 Misc. 543; Germania Safety Vault Co. v. Boynton, 71 Fed. 797). Such transactions will be annulled in any appropriate proceeding, without regard to the form which they may have taken, saving, of course, the rights of innocent third persons."

Circuit Judge Swan in his dissenting opinion said:

> "I think the order expunging the claim should be affirmed on the ground that Rodman, who executed

the purported assignment as President of Natural, had no authority to act on the Corporation's behalf. It is true that consideration is unnecessary to validate an assignment 'in writing and signed by the assignor' N. Y. Pers. Prop. L., Section 33, Subdivision 4. But the assignment upon which the Appellants based their claim was not signed by the assignor but by one who purported to act as an agent of the assignor. To establish their right as assignees, the Appellants had to prove that the agent possessed authority, either actual or apparent, to act on behalf of his principal. Rodman testified that he had no actual authority to execute the assignment and that the only consideration given by the assignees was the delivery by Rice to Rodman personally of shares of stock which Rodman wanted in order to enable him to put through a reorganization of NATURAL. Assuming that there was a valid debt owed by the bankrupt to NATURAL, Rodman as President of NATURAL had neither actual nor apparent authority to give away this corporate asset or sell it for his own advantage. * * *. The Appellants never presented their case on the theory that the corporate entity should be disregarded and the debt owed by the bankrupt treated as a debt owed to Rodman personally which he assigned as principal. Had they made allegations to that effect, they would have lost the case for failure to carry the burden of proving them. When there is a ground (lack of authority in Rodman to assign NATURAL'S claim) adequate to sustain the judgment on the issues presented by the pleadings and proof, I see no good reason for this Court to make over the case and send it back for trial on a theory neither alleged nor proved by the Appellants."

Hence, it is clear that as a result of the decision of the Circuit Court of Appeals, chaos is produced in that in disregard of well established principles of corporate law, the Court accepted an assignment of a stockholder of one of the corporation's assets even though no corporate action was taken thereon since as was conclusively shown, the Board of Directors had not met and had never authorized the making of the assignment.

A decision by this Court is therefore necessary to settle the law.

POINT III

The effect of the decision of the Circuit Court is to disregard the provisions of New York Statutes.

It is respectfully submitted that the decision of the Circuit Court of Appeals disregarded at least two Statutes of the State of New York.

The first is Section 33, Subdivision 4 of the New York Personal Property Law which provides that:

> "An assignment hereafter made shall not be denied the effect of irrevocably transferring the assignor's rights because of the absence of consideration, if such assignment is in writing and signed by the assignor, or by his agent."

As we have shown, the assignment was not made by the assignor and the person making the assignment in behalf of the assignor had no actual or apparent authority to do so. (See the dissenting opinion of Circuit Judge Swan, *supra.*) In addition, it was conclusively proved that there was no consideration for the assignment. Hence the provisions of

Section 33, Subdivision 4, were not applicable to the assignment herein and it was incumbent upon the Respondents to prove the authority of the person making the assignment as well as to prove the consideration therefor. This, they utterly failed to do.

By its opinion, the Circuit Court of Appeals disregarded such Statute and as a result thereof, it is respectfully submitted that a decision by this Court is necessary to settle the law.

The second New York Statute which it is claimed the Circuit Court disregarded is New York Penal Law, Section 274, which among other things, provides that an attorney who violates the provisions thereof is guilty of a misdemeanor. That Section, among other things, prohibits an attorney from taking an assignment with the intent and for the purpose of bringing an action thereon.

Mr. Rudnick, one of the Respondents and one of the assignees, is an attorney. The fact that Mr. Rudnick took such assignment with the intent of bringing an action thereof appears from the assignment itself (R. p. 15) in that it provides:

> "That a suit upon said assignment may be instituted by any two of the assignees."

and

> "The assignees may institute suit upon the claims or accounts assigned herein in their own name and at their own cost and expense."

It will be recalled that it was conclusively proved that no consideration was given by Rudnick for the assignment.

Obviously therefore such assignment was received by him in violation of the provisions of the Penal Statute aforesaid.

However, in utter disregard of such Statute, Circuit Judge Frank in his opinion stated that:

> "Appellee asserts that the assignment was invalid under New York Penal Law, Section 274, because one of the assignees was a lawyer. * * * We incline to believe that, on the facts now before us, this Statute is here inapplicable. * * * *"

Such a holding is in contravention of the New York Statute aforesaid and requires a determination by this Court to settle the law.

CONCLUSION

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

STATEMENT.

(Figures in parentheses refer to folio numbers in printed record.)

All the pertinent facts are contained in the opinion of the Circuit Court of Appeals in support of its mandate, dated December 10, 1946, by which it reversed the order of the District Court and remanded the cause for further hearing. The District Court had expunged the claim filed by the respondents.

POINT I.

THE ORDER OF THE CIRCUIT COURT OF APPEALS IS INTERLOCUTORY AND CERTIORARI SHOULD NOT BE GRANTED TO REVIEW SUCH AN ORDER.

Since its establishment, it has been a marked characteristic of the federal judicial system not to permit an appeal

to this Court until a litigation has been concluded in the courts below. Only in very few situations, where intermediate rulings may carry serious public consequence, has there been a departure from this requirement of finality for federal appellate jurisdiction. (*Radio Station WOW* v. *Johnson*, 326 U. S. 120, 123-124.) The foundation of this policy is not in merely technical conceptions of finality. It is one against piecemeal litigation. "The case is not to be sent up in fragments." (*Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341.) Reasons other than the conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals. (*Catlin* v. *United States*, 324 U. S. 229, 233-234.) To be appealable to this Court, the judgment or decree must not only be final, but complete, not only as to all the parties, but as to the whole subject matter. (*Collins* v. *Miller*, 252 U. S. 364, 370.) Where an appellate court refers a question in the case to the subordinate court for further judicial action, its judgment is not final for the purpose of an appeal or writ of error to this Court. (*Martinez* v. *Inter. Banking Corporation*, 220 U. S. 214, 223; *Slaker* v. *O'Connor*, 278 U. S. 188, 189.) Until the trial court by its order accepts or rejects the claim of the creditor-respondents and complies with the other directions contained in the mandate of the Circuit Court of Appeals, it cannot be said that a final decree has been entered in the cause. The mandate in the proceeding under consideration remanded the cause for further proceedings in order that the rights of the parties might be thereafter finally passed upon.

In no reported bankruptcy case has this Court granted certiorari prior to final judgment or order in the Circuit Court of Appeals. While the Court may have power to issue the writ before final judgment or order, this case raises no question of grave public importance sufficient to justify the exercise of that power.

POINT II.

THE ABSENCE OF THE AFFIDAVIT REQUIRED BY GENERAL ORDER 21, SUBDIVISION 3, IS NOT FATAL TO THE CLAIM. THE ORAL TESTIMONY ALREADY SUBMITTED TAKES THE PLACE OF THE AFFIDAVIT REQUIRED. THE ADDITIONAL EVIDENCE OFFERED TO SUBSTANTIATE THE CLAIM SHOULD HAVE BEEN RECEIVED AND, IF RECEIVED, WOULD HAVE PROVED BEYOND QUESTION THE MERIT OF THE CLAIM.

The claim against the bankrupt was filed in November 1943 and set forth the true consideration for the debt, that no part thereof had been paid, and that it was entirely unsecured. It recited the facts in detail sufficient to give the bankrupt and other creditors the opportunity to investigate the fairness and legality of the claim. It was based on facts which are not in dispute and which were contained in the books and records of the bankrupt and of Natural. Unfortunately, the books and records of the bankrupt, who is the only remaining objectant to this claim (all other creditors having been paid according to the bankrupt's own contention), have never been produced by it in this bankruptcy proceeding. Why they have not been produced has not been explained. Such an objectant should not be looked on with favor by any court. It is because the bankrupt is seeking to cover up this glaring non-production of all its books and records that it seeks to expunge this claim on the basis of alleged technical defects.

Insofar as pertinent, General Order 21, subdivision 3, provides:

> "If a claim has been assigned after the commencement of the proceedings but before proof of claim has been filed, the proof of claim therefor shall be supported by an affidavit of the owner at the time of the commencement of proceedings, setting forth the true consideration for the debt, what payments have been

made thereon, and that it is entirely unsecured, or if secured, the security as is required in proving secured claims. * * *"

The purpose of this General Order is to assure possible objectants in a bankruptcy proceeding that, if the proof of claim is made by an assignee, it shall contain the same information regarding consideration for the debt, payments thereon, and security, if any, as if the proof were made by the original creditor under the provisions of Section 57a of the Bankruptcy Act. In the usual case, the assignee is without knowledge as to the origin of the basic claim and, therefore, the General Order seeks to supply that deficiency by a requirement that the affidavit of the assignor shall contain that information. But where the information is known to the assignees and is based on the books and records of the assignor, on other documentary evidence, and on facts which are not in dispute, the purpose of the General Order is fulfilled and the spirit of the order is complied with even if the affidavit of the assignor is not supplied.

The attorney for the bankrupt has consistently refused to "get involved in a hearing on the merits" (221), *i.e.* as to the claim due to Natural (the assignor) from the bankrupt which had been assigned to the claimants. The claimants have insisted on their right to prove the merits of their claim. It would be a shocking injustice to have the claim expunged merely because of the refusal of a hostile assignor to sign an affidavit.

The purpose of the filing of the affidavit is so that the statement of the consideration should be sufficiently specific and full to enable other creditors to pursue proper and legitimate inquiry as to the fairness and legality of the claim. (*Matter of Scott*, 73 F. 418.) It must give facts in regard to the claim which will enable the trustee and creditors to investigate and ascertain the adequacy of the consideration and the justice and legality of the claim. (*Matter of Coventry Evans Furniture Co.*, 166 F. 516.) It is the consideration for the claim owing by the bankrupt to Natural which

is of importance. The consideration for the assignment by Natural to the claimants is entirely irrelevant.

Here the facts recited in the proof of claim meet all the requirements, except that the affidavit is by the claimants rather than by the assignor. Where the purpose of the order is fulfilled, the one who makes the affidavit is of no consequence.

Where the proof of claim is defective as not complying strictly with the requirements of Section 57a of the Bankruptcy Act, the Referee must allow the claim to be corrected by amendment or established by proof. When the claim is thus established by proof, the testimony and evidence is regarded as written into the claim and the requirements of the statute are satisfied.

In *Hutson* v. *Coffman* (100 F. 2d 640, C. C. A. 9) claimant filed a defective proof of claim because it failed to itemize the consideration for the debt, as required by Section 57a of the Bankruptcy Act. The Circuit Court of Appeals held that, because the claimant introduced no evidence in support of his claim at the hearing on the objections of the trustee to the allowance thereof, the claim was properly disallowed.

In *West Hills Memorial Park* v. *Doneca* (131 F. 2d 374, C. C. A. 9) the Circuit Court of Appeals distinctly held (p. 376) that a deficient claim may be made satisfactory by evidence submitted.

On objection to a claim, the Referee *must* allow the claim if it is corrected by amendment *or* established by proof. (*Matter of Coventry Evans Furniture Co.*, 166 F. 516). The cited case holds that, where the filed claim does not comply with the requirements of the Bankruptcy Act, it is incumbent on the Referee to permit the claimant to establish his claim by such legal evidence that he may submit and thereupon the Referee must make such order as the facts and law warrant.

Where the defects of the claim are thus supplemented by oral testimony and such other evidence as may appear before the Referee, this testimony and evidence is regarded as

written into the claim, and both the written claim and the testimony and evidence then constitute the claimant's claim. (*Matter of Welborne,* 266 F. 385.)

In this case we have been permitted to witness the farce of the president of the assignor testifying in favor of the bankrupt against the claim which he, as president, assigned when, as a matter of law, the assignor warrants that he will do nothing to defeat or impair the value of the assignment (Restatement, Contracts, § 175, subd. 1a); when, as a matter of law, the assignor warrants that the right, as assigned, actually exists and is subject to no limitations or defenses other than those stated or apparent at the time of the assignment (Restatement, Contracts, § 175, subd. 1b); when, as a matter of law, the assignor is estopped from denying the validity of the assignment (*Roorbach* v. *Dale,* 6 Johns. Ch. 469); when, as a matter of law, the assignor warrants that the claim assigned is a valid subsisting obligation (*Sanders* v. *Aldrich,* 25 Barb. 63, 69); and when, as a matter of fact, Rodman himself was the assignee of a one-third share of the proceeds of the recovery on the assigned claim.

It is clear from all of the foregoing that the absence of the affidavit of the assignor is not fatal to the claim since the purpose of the General Order—to give possible objectants sufficient information to investigate the facts and legality of the claim—has been fulfilled in this case. Furthermore, the oral testimony already submitted substantiates the facts of the claim and may be regarded as written into the claim and to take the place of the affidavit of the assignor. Lastly, the books and records of the assignor, and other testimony offered by the claimants, should have been received and, if received, would have satisfied the purpose and spirit of the General Order and would have showed the merit of the claim.

The District Judge has already held that the objectant has not produced sufficient evidence to overcome the proof of claim (191). The objectant never produced any further evidence.

The order of the District Court was properly reversed by the Circuit Court of Appeals on the grounds, as stated in the opinion, that [1] it is apparent that the claimants could not, by the exercise of due diligence, have produced an affidavit which complied with the General Order; [2] the proof of claim filed contained all the information required under the General Order and there is no suggestion that the bankrupt and its creditors have been prejudiced by the absence of any data; and [3] under the circumstances, full literal compliance with the General Order was excused.

POINT III.

NEITHER OF THE PETITIONERS IS IN A POSITION TO CLAIM (1) THAT THERE WAS AN ABSENCE OF CORPORATE ACTION BY NATURAL AUTHORIZING THE ASSIGNMENT; (2) THAT ONLY RODMAN, PRESIDENT OF NATURAL, RECEIVED A PERSONAL BENEFIT FROM THE ASSIGNMENT; (3) THAT RODMAN HAD NO ACTUAL OR APPARENT AUTHORITY TO MAKE THE ASSIGNMENT; AND (4) THAT THERE WAS NO CONSIDERATION RUNNING FROM THE CLAIMANTS TO NATURAL FOR THE ASSIGNMENT.

Those objecting to the $21,000 claim filed by respondents are the petitioners—the bankrupt and one Fishbeck, an alleged creditor in the sum of about $80. Not only is Fishbeck's claim disputed, but the bankrupt's attorney repeatedly insisted that there was no other creditor in the estate except the claimants (521). Therefore, the alleged objecting creditor, has no standing since he is no longer a creditor. In any event, Fishbeck claims he is a creditor of the bankrupt and not of Natural. Fishbeck is a total stranger to Natural and to the transaction here involved.

Both the bankrupt and Natural are New York corporations. The assignment was made in New York. Therefore, New York law governs this transaction.

1. Rodman testified that he was Natural's sole stockholder at the time of the assignment (500-501). The assignment (R. 15) bears a certificate of acknowledgment by Rodman that he signed the assignment as president of Natural and that Natural's seal was affixed thereto and that he was authorized to sign the assignment by order of the Board of Directors (49-50). Assuming, however, without conceding, that the Board of Directors never met and never authorized the making of the assignment, neither this bankrupt (the debtor) nor Fishbeck has any standing to attack the assignment from Natural to the claimants since they represent neither Natural, Natural's stockholders, or Natural's creditors.

The rule is that the authority of an officer or agent of a corporation to do a particular act or make a particular contract may be questioned only by the corporation, its stockholders, or creditors, and where they do not raise an objection, another third person cannot do so or question the validity of the particular act or contract.

In *Eno* v. *Crooke* (10 N. Y. 60) a bank had a judgment against one Smith. The bank assigned the judgment to one Bonesteel without the Board of Directors of the bank having authorized the assignment, as required by statute. The Court of Appeals held that Smith, the debtor, could not question the transfer, saying:

> "None but the corporation or its stockholders or creditors can impeach a transfer of property by the corporation for the want of the previous action of the board of directors, and then only by direct action brought for that purpose. Strangers, the debtors of the bank, and others, have no interest in the question, and cannot go back of the assignment and collaterally impeach the transfer for the want of the formalities which have been imposed by statute for the benefit and protection of others."

2, 3. Assuming, without conceding, that the assignment was made without authority by Rodman to pay his individual debt, neither the bankrupt nor Fishbeck is in a position to attack the assignment on that ground.

In *Belden* v. *Meeker* (2 Lans. 470, aff'd 47 N. Y. 307), Osborn and Wells made their bond and mortgage to a bank. The bond and mortgage were assigned to plaintiff to secure the individual indebtedness of one Hallett, the president of the bank, and without any resolution of the board of directors authorizing the transfer of the bond and mortgage. It was held that the debtor could not raise this objection, the Court saying:

> "* * * although in fact the transfer was made to secure Hallett's individual indebtedness, yet in the absence of any objection on the part of the bank, its stockholders, or creditors, the debtor cannot raise the objection, that there was no consideration between Hallett and the bank for the assignment, or that the use of it, to secure the individual debt of Hallett, was a fraud upon the bank."

4. A. The assignability of claims is determined by the law of the state where the assignment is made. (2 Remington on Bankruptcy, 4th ed., § 896.)

The assignment here involved was executed and delivered in July 1943 at the office of the attorneys for Natural in Brooklyn.

Section 33, subdivision 4, of the Personal Property Law, as added by Laws 1941, chapter 330, effective September 1, 1941, provides:

> "An assignment hereafter made shall not be denied the effect of irrevocably transferring the assignor's rights because of the absence of consideration, if such assignment is in writing and signed by the assignor."

This assignment was made after the effective date of the statute quoted and, therefore, no consideration was required to make it effective.

B. Even before the enactment of Section 33, subdivision 4, of the Personal Property Law a gratuitous assignment of an obligation was effective as against the obligor in that he was under a duty to discharge the obligation to the assignee rather than to the assignor. The obligor could not set up the absence of consideration as against the assignee's demands.

The Court of Appeals said in *Sheridan* v. *Mayor* (68 N. Y. 30 at p. 32):

> "Nor is it of any moment that no consideration was paid for the demand by the assignee. The assignor could give the demand to the plaintiff, or sell it to him for an inadequate consideration, or without any consideration. It is enough if the plaintiff has the legal title to the demand, and the defendant would be protected in a payment or recovery by the assignee. * * * These views are well settled by authority." (Citing cases.)

If the assignee has title to the thing assigned—and that title has not been questioned in this proceeding—the consideration paid for the assignment is immaterial. (*Spencer* v. *Standard C. & M. Corp.,* 237 N. Y. 479, 481, and cases therein cited.)

Even if there was no consideration for the assignment, it does not lie with the bankrupt obligor to object. (*Schwartz* v. *Fletcher,* 238 App. Div. 554, 557.)

C. In any event, there was sufficient consideration for the assignment.

Any benefit that Natural received for the assignment was sufficient consideration. The assignment specifically provides that any suit instituted by the assignees shall be at *their* own cost and expense (45), yet Natural was to receive one-third of the proceeds of any recovery (46-47). Thus the assignment on its face contains a benefit to Natural.

Furthermore, it is not disputed that Rodman needed the stock held by Rice in order to reorganize Natural. It is not

disputed that Natural desired to be reorganized in order to obtain for itself its oil quota (268). Putting Natural in a position whereby it could be reorganized and thus obtain its oil allotment was a direct benefit to Natural, which would be sufficient consideration for the assignment of the claim against the bankrupt.

5. It is not the province of the bankruptcy court in the administration of the estate of the debtor to inquire whether the contract between Natural and its assignees (the claimants here) was in all respects valid and binding as between them. This bankrupt asserts no title to the claim and does not pretend to have any interest in it except as a debtor liable to pay to the proper holder of the claim. There is no party before the court who has any legitimate interest in questioning the assignees' title to the claim or who has, under the circumstances of the case, any right to be heard on that question. This bankrupt and one of the bankrupt's alleged creditors stand as mere volunteers, in behalf of others, not before the court, and who make no claim on their own account. This bankrupt owes the debt and, if it succeeds in defending on the grounds thus far urged, it may escape the payment of a just debt altogether.

Since as a matter of law neither the bankrupt nor the alleged creditor of the bankrupt (Fishbeck) may attack the assignment on any of the grounds raised by the petitioners, the writ of certiorari should be denied.

POINT IV.

SECTION 274 OF THE PENAL LAW IS INAPPLICABLE TO THE FACTS IN THIS CASE.

One of the respondents, Rudnick, is a New York attorney, and is one of the assignees who filed the claim objected to. The contention that the assignment was in violation of Section 274 of the Penal Law of New York was abandoned by petitioners, was disregarded by the Referee and by the

District Judge, and was revived before the Circuit Court of Appeals as a last gasp in a final attempt to expunge the claim. The objection is without merit.

There was no evidence introduced by petitioners at any of the hearings that Rudnick took this assignment "with the intent and for the purpose of bringing an action thereon."

In construing the statute involved, the Court of Appeals stated in *Moses* v. *McDivitt* (88 N. Y. 62), that the language was significant and indicated that:

> "a mere intent to bring a suit on a claim purchased does not constitute the offense; the purchase must be made for the very purpose of bringing such suit, and this implies an exclusion of any other purpose. As the law now stands, an attorney is not prohibited from discounting or purchasing bonds and mortgages and notes, or other choses in action, either for investment or for profit, or for the protection of other interests and such purchase is not made illegal by the existence of the intent on his part at the time of the purchase, which must always exist in the case of such purchases, to bring suit upon them if necessary for their collection. To constitute the offense the primary purpose of the purchase must be to enable him to bring a suit, and the intent to bring a suit must not be merely incidental and contingent. The object of the statute, as stated by Chancellor Walworth in Baldwin v. Latson (2 Barb. Ch. 306), was to prevent attorneys, etc., from purchasing things in action for the purpose of obtaining costs by the prosecution thereof, and it was not intended to prevent a purchase for the purpose of protecting some other right of the assignee."

In commenting upon the case then before it the Court of Appeals said at page 67:

> "The real question upon which the case turned was, whether the main and primary purpose of the purchase was to bring a suit and make costs, or whether

the intention to sue was only secondary and contingent, and the suit was to be resorted to only for the protection of the rights of the plaintiff, in case the primary purpose of the purchase should be frustrated."

In the absence of evidence on the subject, it could not be found as a fact that the statute was violated.

The contention is also invalid as a matter of law. The statute only prohibits an attorney taking an assignment with the intent and for the purpose of bringing "an action" thereon. If he takes it for the purpose of bringing a special proceeding thereon, it is not within the prohibition of the statute. (*Tilden* v. *Aitkin*, 37 App. Div. 28.) So it was held in the case cited that taking an assignment of a claim for the purpose of bringing a proceeding in the Surrogate's Court to compel defendant to account with a view of bringing about payment of the claim was not prohibited by the section. Since proceedings in bankruptcy are special proceedings (*Matter of Flower*, 167 N. Y. S. 778, not officially reported), taking an assignment of a claim in July 1943, when it was known by all the parties involved that a petition in bankruptcy had been filed against the obligor in November 1942 and that it had already been adjudicated, the assignment being for the purpose of filing a claim against the bankrupt in that proceeding, could not have been for the purpose of "bringing an action thereon" and was, therefore, not a violation of the statute.

CONCLUSION.

FOR ALL OF THE FOREGOING REASONS, THE WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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